The Court found that none of the three rulings identified by the Sixth Circuit were clear enough errors (if errors at all) to justify relief. The first error, according to the Sixth Circuit, was the Ohio court's failure to recognize that, under *Miranda,* the police could not speak to Dixon on November 9 because on November 4 Dixon had refused to answer questions without his lawyer present. The Court found this "plainly wrong" because Dixon was not in custody during his chance encounter with police on November 4, and the Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in context other than custodial interrogation" (internal quotations omitted). Second, the Court disagreed with the Sixth Circuit's conclusion that the police violated the Fifth Amendment by encouraging Dixon to "cut a deal" before Hoffner did. The Sixth Circuit cited no Supreme Court precedent suggesting, much less clearly establishing, that this "common police tactic" is unconstitutional and thus had no authority to grant relief on this basis

Finally, the Court disagreed with the Sixth Circuit that the Ohio court unreasonably applied *Oregon v. Elstad,* 470 U.S. 298 (1985). There, a suspect who had not received *Miranda* warnings confessed to burglary and, an hour later, confessed again after he had received warnings. The Court held that the later, warned confession was admissible because the first confession, though obtained in violation of *Miranda,* was voluntary and thus did not give rise to the presumption of coercive effect. Applying this holding, the Ohio Supreme Court concluded that, although Dixon's first interrogation involved an intentional *Miranda* violation, there was no need to suppress Dixon's later, warned confession to murder. The Court held that this was a reasonable application of *Elstad* and that, contrary to the Sixth Circuit's conclusion, *Missouri v. Seibert,* 542 U.S. 600 (2004), did not dictate otherwise. In *Seibert* police employed a "two-step interrogation technique" to reduce the effect of *Miranda*: they exhaustively questioned the suspect until she confessed to murder then, after a 15 – 20 – minute break, gave *Miranda* warnings and led the suspect to repeat her earlier confession. A plurality of the Court held that the second confession was inadmissible because the first, unwarned confession left "little, if anything of incriminating potential left unsaid," making it "unnatural" not to "repeat at the second stage what had been said before." Dixon's case, in the Court's view, differed from *Seibert* in two significant respects. First, Dixon insisted throughout his first interrogation that he had nothing to do with Hammer's disappearance. Thus, unlike in *Seibert,* the police did not lead Dixon to repeat an earlier, unwarned confession. Second, four hours lapsed between Dixon's first interrogation and his receipt of *Miranda* warnings; and during this four-hour period, Dixon

traveled from the station to the jail and back, spoke to his lawyer, and learned that the police were talking to Hoffner and had found Hammer's body. According to the Court, this "significant break in time" and "dramatic change in circumstances" ensured that Dixon's first, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he later received before confessing to murder.

Howes v. Fields, 10-680. The Court unanimously held that the Sixth Circuit erred when it said there is a categorical rule that a prisoner is always "in custody" for *Miranda* purposes any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison. And by a 6-3 vote, the Court held that respondent Randall Fields was not in custody when he was taken to a conference room by prison guards and questioned by law enforcement officers about a crime. Fields was in jail in Michigan when corrections officers escorted him to a conference room where two armed sheriff's deputies interrogated him for five to seven hours about his alleged sexual conduct with a 12-year-old boy prior to his incarceration. The conference room was in a section of the facility separated by locked doors from Fields' usual surroundings. The sheriff's deputies told Fields he was free to leave and return to his cell, but they did not tell him he did not have to talk to them and they did not read him his *Miranda* rights. The deputies did not restrain Fields during the interview. Once confronted with the accusations, Fields became agitated and one deputy, using an expletive, told him to sit down and "if [he] did not want to cooperate, [he] could leave." Ultimately, Fields confessed to engaging in sex acts with the boy. The state charged Fields with criminal sexual conduct. The trial court denied Fields' suppression motion, and his confession was admitted through the testimony of one of the deputies, over Fields' objection. A jury found Fields guilty. The Michigan Court of Appeals affirmed on direct appeal, finding that Fields was not in custody for purposes of *Miranda* when he confessed. The Michigan Supreme Court denied discretionary review. Fields sought and was granted habeas relief in federal district court. The Sixth Circuit affirmed, holding that in *Mathis v. United States*, 391 U.S. 1 (1968), the Supreme Court established that a prisoner is in custody any time he is removed from the general prison population and questioned about a crime that took place outside the jail or prison. In an opinion by Justice Alito, the Court reversed.

Under AEDPA, of course, the Sixth Circuit could not grant habeas relief unless the Michigan Court of Appeals' decision misapplied "clearly established" Supreme Court law. The

Court found that "it is abundantly clear that our precedents do not clearly establish the categorical rule on which the Court of Appeals relied . . . . On the contrary, we have repeatedly declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial." The Court further explained that the Sixth Circuit misinterpreted its holding in *Mathis*, which simply rejected the lower court's conclusion that *Miranda* did not apply because no criminal investigation had yet commenced with respect to the charges on which he was questioned and because he was incarcerated on a separate offense. Finally, the Court stated that *Miranda* itself did not establish the bright-line rule the Sixth Circuit found, noting that "*Miranda* did not even establish that police questioning of a suspect at the station house is always custodial." As such, the Court found the Sixth Circuit violated AEDPA when it granted habeas relief.

The Court next ruled that the categorical rule applied by the Sixth Circuit not only is not clearly established, it is wrong. The Court stated that, in determining whether a prisoner is in custody under *Miranda*, a court should review *all* of the "objective circumstances of the interrogation" to determine whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thus, contrary to the lower court's view, "[d]etermi-ning whether an individual's freedom of movement was curtailed . . . is simply the first step in the analysis . . . ." The second step is to determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." The Court found that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*" based on "at least three strong grounds." First, a person in prison would not typically be shocked by questioning in the same way that an arrest would shock an unincarcerated person. Second, there is no lure of quick release to compel a prisoner to speak. Third, a prisoner likely knows that his questioners have no authority to alter his current sentence. The Court also found, contrary to the Sixth Circuit, that taking a prisoner aside for questioning is not inherently coercive and often is in the prisoner's best interests. Nor, held the Court, does it matter whether the questioning relates to conduct within or outside the prison. Finally, the Court reviewed all the circumstances in this case and concluded that Fields was not in custody for *Miranda* purposes. The primary reason that is so, held the Court, is "the undisputed fact that respondent was told that he was free to end the questioning and return to his cell." The Court also relied on the facts that Fields "was not physically restrained or

threatened and was interviewed in a well-lit, average-sized conference room, where he was 'not uncomfortable.'"

Justice Ginsburg filed an opinion concurring in part and dissenting in part, which Justices Breyer and Sotomayor joined. They "agree[d] that the law is not 'clearly established' in respondent Fields's favor" and that habeas relief was therefore not appropriate. The dissent disagreed, however, with the Court's holding that Fields was not in custody for *Miranda* purposes when he was interviewed. The dissent "would not train, as the Court does, on the question whether there can be custody within custody." Rather, argued the dissent, Fields was in custody because he was "subjected to 'incommunicado interrogation . . . in a police-dominated atmosphere,' . . . was placed, against his will, in an inherently stressful situation,' . . and . . . his 'freedom of action [was] curtailed in a[ ] significant way.'"

5th Amendment / Due Process / Brady

Wetzel v. Lambert, 11-38. In a *per curiam* opinion, the Court summarily vacated the Third Circuit's grant of habeas relief on *Brady* grounds. In 1984, petitioner James Lambert was sentenced to death in Pennsylvania for the murder of two people during the commission of a robbery of a Philadelphia bar. Bernard Jackson, who participated in the robbery, testified for the Commonwealth and identified Lambert and Bruce Reese as participants. About 20 years after his conviction, Lambert filed a state post-conviction application claiming that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a "police activity sheet" dated October 25, 1982. That sheet noted that Jackson named a Lawrence Woodlock as a "co-defendant," without identifying the crime in question. The sheet also stated that neither of the two eyewitnesses to the robbery/murder identified Woodlock as a participant. Lambert argued that the sheet was exculpatory because it identified another participant in the crime, one whom Jackson identified before he identified Lambert. The Commonwealth argued that the statement was ambiguous, as it may well have referred to Woodlock as a co-defendant in one of Jackson's many other crimes. The Commonwealth also pointed out that the sheet would not have furthered Lambert's cause at trial because Jackson was extensively impeached. The Pennsylvania Supreme Court rejected Lambert's claim, holding that the notation's connection to this crime was "purely speculative at best" and that the document would not have had much impeachment value for the reason the Commonwealth gave. Lambert filed a federal habeas

petition, which the district court denied. The Third Circuit reversed, finding that "it was 'patently unreasonable' for the Pennsylvania Supreme Court to presume that whenever a witness is impeached in one manner, any other impeachment evidence would be immaterial." The Court vacated the Third Circuit's decision.

The Court stated that, under AEDPA, a federal court may only grant habeas relief if it concludes that no "fair-minded jurists could disagree with" the "arguments or theories" that supported the state court's decision. The Court concluded that the Third Circuit failed to follow that requirement, for it "overlooked" the Pennsylvania Supreme Court's conclusion that the notations were "not exculpatory or impeaching" but instead "entirely ambiguous." The Third Circuit instead focused on the state court's alternative ground for rejecting Lambert's claim: that any impeach-ment value from the documents would have been cumulative. The Court noted that the Third Circuit's failure to address the "ambiguous" nature of the notations "is especially surprising, given that this was the basis of the District Court ruling." Noting how difficult it would be to retry Lambert "*three decades* after the crime," the Court stated that such a "burden should not be imposed unless "*each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." The Court remanded so that the Third Circuit could determine whether the state court's finding that the notation was ambiguous was objectively unreasonable.

Justice Breyer filed a dissenting opinion, which Justices Ginsburg and Kagan joined. In the dissent's view, the notation was not ambiguous, but rather clearly referenced the robbery at issue. And, argued the dissent, the Pennsylvania Supreme Court did not find the notation ambiguous; it merely pointed out the Commonwealth's argument to that effect. In the end, stated the dissent, the Court was "ill-advised" to have granted certiorari in such a "fact-specific" case.

Smith v. Cain, 10-8145. By an 8-1 vote, the Court held that prosecutors in Orleans Parish, Louisiana, violated *Brady v. Maryland,* 373 U.S. 83 (1963), by failing to provide defense counsel with statements by the single eyewitness who linked petitioner to the crime that called into question the reliability of that identification. Petitioner Juan Smith had been convicted of five counts of first degree murder for taking part in a robbery in which he and two other gunman entered a home intending to steal money and drugs, began shooting, and killed five people.

Three victims survived, including one who escaped, one who hid, and one eyewitness (Larry Boatner) who identified Smith and testified he was face-to-face with Smith during the first few moments of the robbery. In pursuing his post-conviction appeals, Smith obtained police files related to the investigation. Those files contained notes written by the detective from the night of the crime stating that the Boatner "could not . . . supply a description of the perpertrators other than [sic] they were black males," and notes from five nights after the crime stating that Boatner "could not ID anyone because [he] couldn't see faces' and 'would not know them if [he] saw them.'" A report by the same detective stated that Boatner "could not identify any of the perpetrators of the murder." The state post-conviction court denied Smith's *Brady* claim, and the Louisiana Court of Appeal and Louisiana Supreme Court denied review. In an opinion by Chief Justice Roberts, the Court reversed.

The Court observed that the state did not dispute that the statements were undisclosed and favorable to Smith; therefore, the only question was materiality – whether, in light of the undisclosed statements, "the likelihood of a different result is great enough to 'undermine [ ] confidence in the outcome of the trial.'" The Court found that the statements were "plainly material" because the witness's "testimony was the *only* evidence linking Smith to the crime" and the "undisclosed statements directly contradict his testimony." Although the state and dissent advanced reasons why the jury *may* have discounted the statements, the Court had "no confidence that it *would* have done so." Justice Thomas filed a dissent expressing his view that, in light of the other evidence against Smith and various other facts supporting Boatner's trial testimony, the undisclosed notes are "of such minimal impeachment and exculpatory value as to be immaterial."

5th Amendment / Due Process / Sufficiency of Evidence

Coleman v. Johnson, 11-1053. Through a unanimous *per curiam* opinion, the Court summarily reversed a Third Circuit ruling that granted habeas relief on the ground that the evidence at trial was insufficient to support the conviction under *Jackson v. Virginia*, 443 U.S. 307 (1979). Respondent Lorenzo Johnson was convicted as an accomplice and a conspirator in the murder of Traja Williams in Harrisburg, Pennsylvania. The evidence of Johnson's involvement was that he was a close friend of co-defendant Corey Walker and was present when Walker was humiliated by Williams in front of a crowd, prompting Walker repeatedly to

exclaim in Johnson's presence, "I'm going to kill that crackhead." Later that evening, Johnson was seen walking behind Walker, who was leading Williams into an alley. Walker was wearing a long coat, and it was apparent that he was concealing something under it. While Johnson remained standing at the alley's entrance, a loud "boom" was heard coming from the alley. A witness saw two silhouettes fleeing from the alley. Another witness testified that Williams was being forced into the alley. The medical examiner confirmed that the cause of Williams' death was a shotgun blast. The trial court denied Johnson's post-trial motion arguing that the evidence did not support the guilty verdict. The state appeals court affirmed, and the Pennsylvania Supreme Court denied review. After unsuccessfully seeking post-conviction relief in state court, Johnson filed a habeas petition in federal district court, which denied his petition. The Third Circuit reversed. It concluded that the notion that "Johnson shared Walker's intent to kill Williams" was supported by "mere speculation" that no rational factfinder could accept as true. In a *per curiam* opinion, the Court reversed the Third Circuit.

The Court reiterated that habeas claims under *Jackson* "face a high bar." A petitioner must overcome "two layers of judicial deference": first, "[a] reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury"; second, a federal habeas court may overturn a state court decision rejecting a sufficiency of the evidence challenge only if the state court was objectively unreasonable. The Court concluded that the Third Circuit panel "failed to afford due respect to the role of the jury and the state courts of Pennsylvania." As an initial matter, the Court faulted the Third Circuit for looking to state law for the standard it applied when assessing the jury verdict. Under the Due Process Clause, "the minimum amount of evidence . . . to prove the offense is purely a matter of federal law." The Court then held that "*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial. . . . This deferential standard does not permit the type of fine-grained factual parsing in which the Court of Appeals engaged." The Court found that based on the evidence presented, "a rational jury could infer that Johnson knew that Walker was armed with a shotgun; knew that he intended to kill Williams; and helped usher Williams into the alley to meet his fate." The evidence was thus sufficient to convict Johnson as an accomplice and as a conspirator to murder. And the state court's holding to that effect was entitled to deference on habeas review.

Parker v. Matthews, 11-845. Through a unanimous *per curiam* opinion, the Court summarily reversed a Sixth Circuit decision that had granted habeas relief to respondent. In 1981 respon-dent David Matthews broke into the home of his estranged wife and murdered her and her mother. Matthews was indicted for both murders and for burglary. At trial Matthews did not deny that he killed the two victims. Rather he tried to prove that he had acted under "extreme emotional disturbance," which would have reduced the murder charges to manslaughter. Matthews offered testimony of his troubled relationship with his estranged wife and introduced expert testimony from a psychiatrist who opined that Matthews was indeed "acting under the influence of extreme emotional disturbance" at the time of the killings. The jury convicted Matthews on all charges and he was sentenced to death. In 1985 the Kentucky Supreme Court affirmed the convictions and sentence, specifically rejecting his argument that the evidence failed to prove that he acted without extreme emotional disturbance. The court found that the evidence of Matthews' "conduct before, during and after the offense was more than sufficient to support the jury's findings of capital murder." The court also rejected a claim of prosecutorial misconduct on the merits, but without discussion. Matthews eventually filed a federal habeas petition, but the district court denied relief. A divided panel of the Sixth Circuit reversed, holding that "the Kentucky Supreme Court had impermissibly shifted to Matthews the burden of proving extreme emotional disturbance, and that the Commonwealth had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt." The court also held that certain remarks in the prosecutor's closing argument constituted a denial of due process. Through a *per curiam* decision, the Court summarily reversed.

The Court stated that the Sixth Circuit "set aside two 29-year-old convictions based on the flimsiest of rationales," and that the "court's decision is a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes." The Court reiterated that the standard AEDPA sets forth in 28 U.S.C. §2254(d) is "difficult to meet" and is "highly deferential." It then turned to the Sixth Circuit's reasoning and rejected it. As noted, the Sixth Circuit first ruled that "the Kentucky Supreme Court had impermissibly shifted to Matthews the burden of proving extreme emotional disturbance." The Court found that that may, in fact, have been the case — but also found that it did not matter because the trial court clearly instructed the jury that the Commonwealth had to prove beyond a reasonable doubt that Matthews had not acted under the influence of extreme emotional disturbance. It was therefore "irrelevant that the [Kentucky Supreme Court] also invoked a ground of questionable validity."

The Court next held that the Sixth Circuit erred in disagreeing with the Kentucky Supreme Court's conclusion that the evidence supported a finding of no extreme emotional disturbance. The Court reiterated that "it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial." Under *Jackson v. Virginia*, 443 U.S. 307 (1979), the evidence is sufficient to support a conviction whenever, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The Court noted that AEDPA deference to state courts is layered on top of that deferential standard. The Court found that in light of this "twice-deferential standard," the Sixth Circuit "overstepped the proper limits of its authority" in discounting the evidence that pointed against Mathews' expert's testimony. (Among that evidence was Mathews' behavior the day of the murders, which suggested careful deliberation and steps to hide the evidence.) In the end, held the Court, "it was not unreasonable" for the Kentucky Supreme Court "to conclude that *the jurors* were entitled" resolve the conflicting evidence against the expert's testimony.

Finally, the Court held that the Sixth Circuit erred in granting habeas relief on the ground that certain remarks by the prosecutor during closing argument — suggesting that Matthews had colluded with his lawyer and the expert to manufacture the extreme emotional disturbance defense — violated the Due Process Clause. The Court noted that the "clearly established Federal law" relevant to that claim is *Darden v. Wainwright*, 477 U.S. 168 (1986), which held that a prosecutor's improper comments violate the Constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." The Court concluded that the Kentucky Supreme Court was not objectively unreasonable in finding no such violation here. First, although the prosecutor did make statements that could be understood as raising a collusion charge, the prosecutor immediately followed those statements by expressly disavowing any suggestion of collusion. Second, "even if the prosecutor's comment is understood as directing the jury's attention to inappropriate considerations, that would not establish that the Kentucky Supreme Court's rejection of the *Darden* claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement" (internal quotation marks omitted). On this point, the Court criticized the Sixth Circuit for "consulting its own precedents" in assessing the issue. "Circuit precedent," held the Court, "cannot form the basis for habeas relief under AEDPA. Nor can the Sixth Circuit's reliance on its own precedents be defended in this case on

the ground that they merely reflect what has been 'clearly established' by our cases. The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here."

Cavazos v. Smith, 10-1115. By a 6-3 vote, the Court summarily reversed a Ninth Circuit decision that had granted habeas relief under *Jackson v. Virginia,* 443 U.S. 307 (1979) (allowing court to set aside jury's verdict if no rational trier of fact could have agreed with jury). Respondent Shirley Ree Smith was convicted of murdering her 7-week old grandchild, Etzel Glass, by shaking her vigorously. At trial, competing experts disputed whether Etzel's death was attributable to sudden infant death syndrome (SIDS) or shaken baby syndrome (SBS). The prosecution presented three medical experts, each of whom opined that SBS caused the death. Specifically, two medical examiners who participated in Etzel's autopsy testified that the autopsy revealed recent hemorrhages of the brain; that such bleeding and a bruise and abrasion on the lower back were consistent with violent shaking; that severe shaking can cause the brain directly to tear in vital areas, causing death with very little bleeding; that Etzel's injuries were consistent with that pathology; that his injuries could not be attributed to a fall from the sofa or efforts to administer CPR; and that the signs of internal trauma ruled out SIDS. (The prosecution experts could not identify the precise location of the tear in the brain, explaining that Etzel's death happened too quickly for the effects of the trauma to develop.) The defense called two experts. The first, a pathologist, testified that Etzel died from brain trauma, not SIDS, but that the lack of retinal hemorrhaging ruled out SBS. (On cross-examination, however, he conceded that an absence of retinal hemorrhaging does not exclude a finding of SBS.) The second expert, a pediatric neurologist, testified that SIDS *did* cause Etzel's death. The jury found Smith guilty; the trial judge sentenced her to a term of 15 years to life; and the state courts affirmed on appeal. A federal district court denied habeas relief, but the Ninth Circuit reversed. The court concluded that there was "no evidence to permit an expert conclusion one way or the other" whether sudden shearing or tearing of the brainstem caused Etzel's death because there was "no physical evidence of...tearing or shaking, or other evidence supporting death by violent shaking." According to the Ninth Circuit, the state's experts "reached [their] conclusion because there was no evidence in the brain itself of the cause of death." The court therefore ruled that the California Court of Appeal had "unreasonably applied" *Jackson v. Virginia* in upholding Smith's conviction. Through a *per curiam,* opinion the Court reversed.

The Court stated that the Ninth Circuit's "conclusion was plainly wrong." Specifically, the Court stated that "[t]e jury was presented with competing views of how Etzel died," and that "[t]he State's experts, whom the jury was entitled to believe, opined that the physical evidence was consistent with, and best explained by, death from sudden tearing of the brainstem caused by shaking." And contrary to the Ninth Circuit's assertion, "there *was* 'evidence in the brain itself'" of the cause of death – the hemorrhaging of the brain and the bruise and abrasion on the lower back. The Court therefore concluded that "the Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise." The Court acknowledged that doubts about Smith's guilt "are understandable," but cautioned that "it is not the job of this Court, and was not that of the Ninth Circuit to decide whether the State's theory was correct. The jury decided that question, and its decision is supported by the record." Finally, the Court noted that it had twice vacated the Ninth Circuit's judgment in this case and remanded to "call[] the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in §2254(d) habeas cases." The Ninth Circuit's refusal to "seriously confront[] the significance of [those] cases…necessitates this Court's action today."

Justice Ginsburg filed a dissenting opinion, which Justices Breyer and Sotomayor joined. The dissent criticized the Court for exercising its discretion to intervene in this case. At bottom, argued the dissent, the Court's intervention accomplished nothing more than error correction, a ground that does not usually warrant a grant of certiorari. Moreover, "[w]hat is now known about shaken baby syndrome (SBS) casts grave doubt on the charge leveled against Smith; and uncontradicted evidence shows that she poses no danger whatever to her family or anyone else in society."

5th Amendment / Due Process / Closing Argument

Parker v. Matthews – See Page 27

5th Amendment / Due Process / Eye Witness

Perry v. New Hampshire, 10-8974. In an 8-1 decision, the Court held that the Due Process Clause does not require a trial judge to screen eyewitness evidence for reliability

pretrial when suggestive circumstances surrounding the identification were not arranged by law enforcement officers. Police responded to a report that someone was breaking into cars in the parking lot of an apartment building. The first responding officer, Officer Clay, encountered petitioner Barion Perry in the parking lot holding two car stereo amplifiers, which Perry stated he found on the ground. Officer Clay asked Perry to remain in the parking lot with a second officer, while she went to interview the reporting person's wife, Nubia Blandon. Blandon stated that through her kitchen window she saw an African-American man take "a big box" from the trunk of her neighbor's car. When Clay asked her for a more detailed description of the man, she "pointed to her kitchen window and said the person she saw breaking into [her neighbor's] car was standing in the parking lot, next to the police office." Police arrested Perry. Prior to trial, Perry moved to suppress the identification, arguing it violated his due process rights. The trial court denied his motion on the ground that the identification "did not result from an unnecessarily suggestive procedure 'manufacture[d] . . . by the police." The New Hampshire Supreme Court affirmed for the same reason, rejecting Perry's argument that the suggestive circumstances alone triggered the court's duty to assess the reliability of the identification before it could be presented to the jury. In an opinion by Justice Ginsburg, the Court affirmed.

The Court observed that, as a general matter, the Constitution "protects a defendant against conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant the means to persuade the jury that the evidence should be discounted as unworthy of credit." The Constitution does this by providing a right of counsel, compulsory process, and confrontation and cross-examination of witnesses. The Court has only imposed due process constraints on criminal trials when evidence "is so extremely unfair that it's admission violates fundamental conceptions of justice." The Court then rejected Perry's reliance on a series of cases involving "police-arranged identification procedures." In those cases – such as *Stovall v. Denno,* 388 U.S. 293 (1967), and *Neil v. Biggers,* 409 U.S. 188 (1972) – the Court held that the Due Process Clause "requires suppression of an eyewitness identification tainted by police arrangement" if the procedure was "both suggestive and unnecessary" and the improper police conduct created a "substantial likelihood of misidentification." The Court concluded here that those cases do not require judicial prescreening of "eyewitness evidence any time an identification is made under suggestive circumstances." Rather, the "due process check for reliability . . . comes into play

only after the defendant establishes improper police conduct." In short, those cases were about preventing "unfair police practices," not ensuring that certain evidence was reliable.

Nor, observed the Court, does Perry's proposed rule make practical sense. Eyewitness identifications may be unreliable for many reasons – such as the passage of time, how far the witness was from the suspect, and how long the witness observed the incident – having nothing to do with "suggestive circumstances." The logic of Perry's position "would thus entail a vast enlarge-ment of the reach of due process as a constraint on the admission of evidence," one the Court was not willing to embrace. In addition, almost all eyewitness identifications can be characterized as having involved "suggestive circumstance," which further show the breadth and inadvisability of Perry's proposal. The Court stated that it did not doubt the importance of eyewitness testimony or its fallibility. But it concluded that our system places reliability determinations within the province juries; and noted that many federal and state courts have adopted instructions specifically designed to deal with concerns about eyewitness identifications.

Justice Thomas filed a brief concurring opinion expressing his view that the *Stovall v. Denno* line of cases was wrongly decided. Justice Sotomayor filed a dissenting opinion. In her view, the *Stovall* line of cases was driven by reliability concerns – concerns that apply whether or not the suggestive circumstances were created by the police. She also criticized the Court for created a rule that looks like the *mens rea* of the police.

5th Amendment / Double Jeopardy

Blueford v. Arkansas, 10-1320. In a 6-3 ruling, the Court held that the Double Jeopardy Clause does not bar retrying a defendant on the greater offenses of capital murder and first-degree murder where the jury foreperson announced in court that the jury was "unanimous against" guilt on those two offenses and deadlocked on a lesser-included offense, the jury resumed deliber-ations, and the judge declared a mistrial when the jury still could not reach a verdict after further deliberations. A one-year-old boy died from a severe head injury caused by defendant Alex Blueford, the mother's boyfriend. The State of Arkansas charged Blueford with capital murder, which included three lesser offenses: first-degree murder, manslaughter, and negligent homicide. At trial, the judge instructed the jury that it could consider the next lesser offense only if it had a reasonable doubt as to defendant's guilt on the preceding greater

offense; and that it could acquit the defendant only after it unanimously found him not guilty of all charges. (This is known as an "acquittal-first" instruction.) A few hours into deliberations, the jury foreperson informed the judge that it was "unanimous against" capital murder and first-degree murder, it was deadlocked on manslaughter, and that it had not reached negligent homicide. The judge instructed the jury to continue deliberating. Blueford asked for new verdict forms to be submitted to the jury for capital murder and first-degree murder, but the judge denied this request for a partial verdict. About a half-hour later, the jury foreperson returned and stated they could not reach a verdict. The judge declared a mistrial and discharged the jury. The state later sought to retry Blueford on all counts. Relying on the Double Jeopardy Clause, Blueford moved to dismiss the capital murder and first-degree murder counts. The trial court denied the motion to dismiss and the Arkansas Supreme Court affirmed. The court ruled that the foreperson had not acquitted Blueford of the greater offenses simply by disclosing the jury's mid-deliberation votes, and that the trial court did not err in denying Blueford's request to have new verdict forms given to the jury. In an opinion by Chief Justice Roberts, the Court affirmed.

Blueford contended that although no formal judgment of acquittal was entered, "acquittal is a matter of substance, not form," and that "the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder represented . . . a resolution of some or all of the elements of those offenses in Blueford's favor." Disagreeing, the Court ruled that "the foreperson's report was not a final resolution of anything," because "the jury's deliberations had not yet concluded." In particular, "[t]he fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal." Nor did it matter, held the Court, that the instructions permitted the jury to transition from a greater offense to a lesser offense only after voting to acquit on the greater offense. The Court found that nothing in the jury instructions barred the jurors from reconsidering an initial vote to acquit on a greater offense; "[t]he jurors were never told that once they had a reasonable doubt, they could not rethink the issue." Finally, the Court distinguished *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970), which "held the Double Jeopardy Clause is violated when a defendant, tried for a greater offense and convicted of a lesser-included offense, is later retried for the greater offense." In those cases, jury's verdict was final. Here, by contrast, the jury could have reconsidered its initial vote to acquit on the greater offenses.

The Court next rejected Blueford's claim that the trial court abused its discretion by declaring a mistrial on all offenses. Blueford asserted that, given the foreperson's report, there was no manifest necessity warranting a mistrial with respect to the capital and first-degree murder offenses. In his view, the court should have taken "some action," such as providing partial verdict forms to the jury. The Court again disagreed, holding that it has "never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking an impasse — let alone to consider giving the jury new options for a verdict." The Court noted that "under Arkansas law, the jury's options . . . were limited to two: either convict on one of the offenses, or acquit on all." The Court held that "the trial court did not abuse its discretion by refusing to add another option."

Justice Sotomayor wrote a dissenting opinion, which Justices Ginsburg and Kagan joined. The dissent urged that in determining whether the jury has acquitted a defendant "form is not to be exalted over substance." And under *Smith v. Massachusetts*, 543 U.S. 462 (2005), the question should be whether the jury has made "a substantive determination that the prosecution has failed to carry its burden." The dissent concluded that under Arkansas law the jury's determination of reasonable doubt was an acquittal "in essence" for double-jeopardy purposes. Responding to the majority, the dissent doubted whether the jury revisited its prior not-guilty findings on the murder counts; more likely it used the remaining time trying to resolve the deadlock on the manslaughter count. The dissent also found *Green* dispositive for Blueford: if a guilty verdict on a lesser offense was an implied acquittal of the greater offense, so too was a hung jury on a lesser offense, as happened here. The dissent "would therefore hold that the Double Jeopardy Clause requires a trial judge, in an acquittal-first jurisdiction, to honor a defendant's request for a partial verdict before declaring a mistrial on the ground of jury deadlock."

5th Amendment / Double Jeopardy- Cert Granted

Evans v. Michigan, 11-1327. The question presented is whether "the Double Jeopardy Clause bar[s] retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that fact." Petitioner Lamar Evans was charged with "burning other real property" in violation of Mich. Comp. Laws §750.73 for starting a fire in a vacant house. At the close of the

prosecution's case, Evans' counsel move for a directed verdict on the ground that the prosecution failed to prove that the building in question was not a dwelling. The trial court granted the motion, holding that an element of "burning other real property" in violation of §750.73 was that the building in question not be a dwelling; and that the state failed to prove that element. The Michigan Court of Appeals reversed, holding that whether the building was a dwelling was *not* an element of "burning other real property," and that the state may retry Evans for that offense. The Michigan Supreme Court affirmed in a 4-3 ruling. 810 N.W.2d 535.

The Michigan Supreme Court held "that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." The court relied on *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), which held that courts "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." The Michigan Supreme Court concluded that "a constitu-tionally meaningful difference exists between this case, in which the trial court identified an extraneous element and dismissed the case solely on that basis," and those cases "in which the trial courts made evidentiary errors regarding how to prove the governing law." The court found that "a court's adding an extraneous element and resolving the case solely on the basis of that added element prevents any evaluation of the charged crime on the merits and thus completely thwarts society's interest in allowing the prosecution one full and fair opportunity to present its case."

In his petition, Evans argues that *Arizona v. Rumsey*, 467 U.S. 203 (1984), and *Smith v. Massachusetts*, 543 U.S. 462 (2005), establish that a directed verdict based on a trial judge's requiring the state to prove something the law does not require constitutes an acquittal for double jeopardy purposes. He contends there is no "extra element exception" to that jurisprudence. Indeed, argues Evans, "the distinction the Michigan Supreme Court found between a judge increasing the prosecution's burden by misconstruing the elements of the offense and increasing the prosecution's burden by adding an element to that offense is one of form and not substance." In support of that notion, he posits that the trial judge's error in this case can be recast as a misconstruction of the element of the charged offense requiring the jury to find that "the property that was burned was a building or any of its contents."

6th Amendment – Crawford

Williams v. Illinois, 10-8505. By a 4-1-4 vote, the Court held that a defendant's Confrontation Clause rights were not violated when an expert witness, relying on the DNA testing performed — and lab report prepared — by another DNA analyst, gave her expert opinion that there was a DNA match. A four-Justice plurality (the Chief Justice and Justices Alito, Kennedy, and Breyer) reasoned that the expert could be cross-examined and that the out-of-court statements (the lab report) related by the expert to explain her assumptions "are not offered for their truth and thus fall outside the scope of the Confrontation Clause." An opinion by Justice Thomas concurring in the judgment rejected that reasoning but reached the same result based on his conclusion that the statements in the lab report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." He specifically noted that the lab report was "neither a sworn nor a certified declaration of fact," and that although it was signed by two "reviewers," neither of them "purport[ed] to have performed the DNA testing nor certif[ied] the accuracy of those who did."

Hardy v. Cross, 11-74. By per curiam opinion, the Court unanimously held that the Seventh Circuit erred in granting habeas relief to respondent Irving Cross on the groping that the prosecution failed to make a good faith effort to obtain the presence of a key witness at trial, in violation of the Confrontation Clause. Cross was originally tried for kidnapping and sexually assaulting the victim, A.S., at knifepoint. Despite her fear of testifying, A.S. was the state's main witness at trial and was cross-examined by Cross' attorney. The jury ultimately found Cross not guilty of kidnapping but was unable to reach a verdict on the sexual-assault charges. A day before retrial on those charges was set to begin, the state moved to have A.S. declared unavailable and to introduce her prior testimony. The state claimed that it had remained in "constant contact" with A.S. and her mother since the first trial and that A.S. had stated she was willing to testify again. But a few weeks before the retrial, A.S.'s mother and brother told the state that she was "very fearful" of testifying and had run away. The state contracted A.S.'s father, but he too stated he did not know where she was. The state then began efforts to locate A.S., including taking the following actions: constant visits to the home of A.S. and her mother; visits to the home of A.S.'s father; telephone calls to A.S.'s mother, father, and other family members; contacting the family of an old boyfriend of A.S.; and checking with the medical examiner's office, local hospitals, A.S.'s school, the morgue, the post office, the county jail and

the department of corrections, and the Illinois Secretary of State and Departments of Public Aid, Public Health, Corrections, and Immigration. In light of these efforts, the trial judge granted the state's motion and declared A.S. unavailable. Her earlier cross-examined testimony was then read to the jury, which found Cross guilty of two counts of criminal sexual assault. The Illinois Court of Appeals affirmed, holding that the state had made a good-faith effort to find A.S. and that the trial judge properly admitted her previous testimony. After the Illinois Supreme Court denied leave to appeal, Cross filed a habeas petition under 28 U.S.C. §2254. The district court denied relief, but the Seventh Circuit reversed, identifying three reasons why the state's efforts to find A.S. were inadequate. The Court unanimously reversed.

The Court held that the Confrontation Clause does not require the state to exhaust every avenue of inquiry, "no matter how unpromising," in order to locate a missing witness. Rather, under the Court's clearly established precedent, the state need only make a "good-faith effort," which is a question of "reasonableness." The Court concluded that the Illinois Court of Appeals correctly identified and reasonably applied this standard and that, in holding otherwise, the seventh Circuit departed from the highly deferential standard required by §2254. According to the Court, the state was not obligated to take any of the three additional steps identified by the Seventh Circuit because they were highly unlikely to lead to useful information. For instance, the Seventh Circuit criticized the state for failing to contact A.S.'s current boyfriend and friends, but the Court observed, none of her family members or any of the other persons interviewed by the state gave any reason to believe that those individuals had knowledge about her whereabouts. The Court also found it wrong for the Seventh Circuit to fault the state for not making inquires at A.S.'s cosmetology school, given that she had not attended the school for some time. Finally, the Court rejected the seventh Circuit's conclusion that the state should have served A.S. with a subpoena after she expressed fear about testifying at the retrial, observing that she was also fearful during the first trial but nonetheless appeared in court and took the stand. In addition, the court noted the lack of clearly established Court precedent holding that the state must issue a subpoena if it wants to prove that a missing witness is unavailable for Confrontation Clause purposes. In the end, the Court concluded that, while it is always possible in hindsight to identify other avenues of inquiry, the deference required by §2254 "does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken."

6th Amendment / IAC (Ineffective Assistance of Counsel)

Lafler v. Cooper, 10-209. By a 5-4 vote, the Court held that a defendant's Sixth Amendment right to effective counsel is violated when his counsel provides deficient advice not to accept a plea offer and he is then convicted after a fair trial and sentenced to a longer term than he would have received under the plea offer. Respondent Anthony Cooper was charged with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges and recommend a 51-to-85-month sentence in exchange for Cooper's guilty plea. Cooper had informed the court that he wanted to admit his guilt and accept the offer. But Cooper changed his mind on the advice of counsel, who convinced Cooper that the prosecution would be unable to prove his intent to murder because the victim was shot below the waist. He therefore rejected the offer and went to trial, was convicted on all counts, and was issued a mandatory sentence of 185 to 360 months. Cooper's claims of ineffective assistance were rejected in state court. On federal habeas review, the district court granted a conditional writ ordering specific performance of the original plea offer, and the Sixth Circuit affirmed. In an opinion by Justice Kennedy, the Court agreed that Cooper's Sixth Amendment right to effective counsel was violated; and vacated and remanded so that the lower courts could reevaluate the appropriate remedy based on the Court's opinion.

The Court reiterated that although defendants have no right to be offered a plea or to have the judge accept one, they maintain a Sixth Amendment right to effective assistance during the plea-bargaining process. There was no dispute here that Cooper's counsel performed deficiently. The issue, rather, was whether he could establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to "show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court held that when ineffective advice leads to a plea offer's acceptance, prejudice exists if "there is reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Here, of course, "the ineffective advice led not to an offer's acceptance but to its rejection." In that situation, held the Court, "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that

the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than the judgment and sentence that in fact were imposed."

The Court rejected the state's contention (supporting by the United States) that, because the Sixth Amendment's purpose is to ensure a fair trial, errors before trial "are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself." Stating that the Sixth Amendment "is not so narrow in its reach," the Court explained that the constitutional "guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." As support for that proposition, the Court pointed to opinions holding that defendants have the right to effective counsel on appeal and at sentencing; and holding that a fair trial does not cure pretrial errors such as the exclusion of African-Americans from a grand jury. The Court also rejected the state's related contention that the Sixth Amendment's purpose is to ensure "the reliability of [a] conviction following trial." The Court stated that "here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it." And the Court pointed to *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (attorney's failure to move to suppress evidence under the Fourth Amendment could be basis of Sixth Amendment violation justifying habeas relief), as an example "where a reliable trial does not foreclose relief." In the end, said the Court, the state's "position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials."

Turning to remedy, the Court ruled that where the defendant is convicted of the same charge that he would have admitted to as part of the plea, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." The situation is more complicated when the offer would have allowed the defendant to plead guilty to less serious offenses than the ones he was convicted of after trial. "In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal," after which "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." The Court declined to set the boundaries of the sentencing court's discretion in issuing a remedy, but identified two relevant considerations: a court may take account of the

defendant's prior expressed willingness or unwillingness to accept responsibility; and a judge need not disregard information about the crime that was learned after the plea offer was made. Turning to the facts of this case, the Court (1) found that the federal court did not need to apply AEDPA deference because the state court failed to apply *Strickland* at all; (2) ruled that Cooper showed both ineffective performance and prejudice; and (3) held that the "correct remedy . . . is to order the State to reoffer the plea agreement," after which "the state trial court can then exercise its discretion" in the manner described in the Court's opinion.

Justice Scalia wrote a dissenting opinion, which Justice Thomas joined in full and Chief Justice Roberts joined in large part. Justice Scalia criticized the majority for "open[ing] up a whole new field of constitutionalized criminal procedure: plea-bargaining law." In his view, the Court's precedents establish that the right to counsel extends to pretrial events "where counsel's absence might derogate from the accused's right to a fair trial" (internal quotation marks omitted). Therefore, "*acceptance* of a plea offer is a critical stage" because the defendant abandons his right to a fair trial by accepting an offer. But holding that a defendant is entitled to the advice of competent counsel before *rejecting* a plea offer "is a vast departure from our past cases, protecting not just a constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining." Justice Scalia also criticized the Court for adopting "a remedy unheard-of in American jurisprudence," one that gives trial courts the discretion to leave the conviction and sentence undisturbed. In the end, said Justice Scalia, the Court "elevates plea bargaining from a necessary evil to a constitutional entitlement." Justice Alito filed a separate dissent that agreed with much of Justice Scalia's reasoning and which highlighted two situations in which he believes it would be an abuse of discretion for a trial court to require the prosecution to renew an old plea offer: "when important new information about a defendant's culpability comes to light after the offer is rejected" and "when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources."

Missouri v. Frye, 10-444. In a 5-4 ruling, issued along with *Lafler v. Cooper,* the Court held that a defendant's Sixth Amendment right to effective counsel is violated when his counsel's deficient performance results in loss of a plea offer and he later pleads guilty and is sentenced to a longer term than he would have received under the lost plea offer. In August 2007, respondent Galin Frye was charged with driving with a revoked license; he had also been

convicted of the same offense on three prior occasions. Frye was thus charged with a felony carrying a maximum term of four years in prison. The prosecutor sent a letter to Frye's attorney offering a choice of two plea bargains, one of which would have reduced the charge to a misdemeanor. The letter stated that both offers would expire on December 28, 2007. Frye's attorney did not advise him of the offers. On December 30, 2007, Frye was again arrested for the same offense. Frye later pleaded guilty to the August 2007 offense without the benefit of a plea bargain and was sentenced to three years in prison, which was the higher of the two plea offers originally made. Frye petitioned for post-conviction relief in state court, alleging that he would have accepted the plea offer to the misdemeanor had he known about it. The state court denied the petition but the appeals court reversed, finding that Frye had met both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984): counsel's failure to communicate the offers to Frye was deficient performance that prejudiced Frye because he later pled to a felony instead of the misdemeanor with its lesser sentence. The appeals court remanded to allow Frye either to insist on a trial or plead guilty to any offense the prosecutor deemed appropriate. In an opinion by Justice Kennedy, the Court agreed that Frye's counsel performed ineffectively and that ineffective assistance in this context could serve as the basis of a Sixth Amendment violation. The Court vacated the lower court opinion, however, because the lower court did not articulate and apply the correct standard for prejudice.

The Court observed that in *Hill v. Lockhart*, 474 U.S. 52 (1985), it held that the *Strickland* two-part test, slightly modified, applies in the plea-bargain context; and that in *Padilla v. Kentucky*, 559 U.S. ___ (2010), it held that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." But, noted the Court, those cases did not resolve the present dispute because *Hill* and *Padilla* involved ineffective advice leading to an offer's acceptance, not its rejection. As the state argued, formal court proceedings occur before a plea is accepted, which (in contrast to the plea-rejection situation) "affords the State substantial protection against later claims that the plea was the result of inadequate advice." Plus, there is no right to receive a plea offer. Still, held the Court, those contentions "do not suffice to overcome [the] simple reality" that 97% "of federal convictions and [94%] of state convictions are the result of guilty pleas. . . . The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance that the Sixth Amendment requires . . . at critical stages."

The Court then turned to "defin[ing] the duty and responsibilities of defense counsel in the plea bargain process." The Court found it "neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." But it did hold that, "as a general rule, defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." The Court added that, although professional bar standards are not dispositive, "these standards can be important guides." In addition, the Court stated that trial courts can "adopt some measures to help ensure against late, frivolous, or fabricated claims," such as by requiring plea offers to be in writing or to be made part of the record. The Court next held that to show prejudice from ineffective counsel that results in a rejected plea offer, defendants must show a reasonable probability they would have accepted the earlier offer had they been given effective assistance and a reasonable probability the plea would have been entered without the prosecution canceling it or the court refusing to exercise its discretion to accept it. Applying those standards here, the Court found that Frye's counsel performed ineffectively and that Frye would have accepted the plea offer. The Court remanded, however, for the state court to determine whether Frye can show a reasonable probability the plea offer "would have been adhered to by the prosecution and accepted by the trial court." The Court doubted either was likely in light of Frye's intervening violation for the same offense.

Justice Scalia wrote a dissent that Chief Justice Roberts and Justices Thomas and Alito joined. The dissent reiterated the concerns expressed in Justice Scalia's dissent in *Lafler*, and added that "[h]ere it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction." The dissent also expressed concern that it will be very hard to determine what constitutes ineffective performance in the plea bargain process. Nor, asserted the dissent, will it often be easy to determine whether the defendant would have accepted the earlier plea offer, whether the prosecution would have withdrawn the plea offer, or whether the trial court would have approved it.

6th Amendment / IAC

Martel v. Clair, 10-1265. Reversing the Ninth Circuit, the Court unanimously held that the district court did not abuse its discretion when it declined a capital inmate's request – after